

Supreme Court No. 80420-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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FILED
SUPREME COURT
STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR POINTE
OWNERS ASSOCIATION,

Petitioners.

PETITIONERS' ANSWER TO RESPONDENT'S MOTION TO
DISMISS

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I. IDENTITY OF RESPONDING PARTY

Petitioners Villas at Harbour Pointe Owners Association ("Association") and T & G Construction, Inc. ("T & G") are the answering parties.

II. STATEMENT OF RELIEF SOUGHT

Petitioners respectfully request that this Court deny Respondent's putative Motion to Dismiss for the following reasons:

(a) The motion incorporates legal arguments that address Petitioners' first Issue Presented on Review, and therefore, should be decided on the merits following oral argument rather than in a motion to dismiss;

(b) Issues of whether the trial court in the construction defect lawsuit maintained jurisdiction do not affect the jurisdiction of this Court to decide this petition; and

(c) There is no legal authority supporting the relief requested.

III. FACTS RELEVANT TO MOTION

The underlying petition arises from judgment entered against Respondent Mutual of Enumclaw Insurance Company ("MOE") in an insurance declaratory judgment and bad faith action stemming from a condominium construction defect lawsuit. In the construction defect lawsuit, the Association settled with T & G, MOE's insured. As part of

the settlement, T & G assigned to the Association all claims against MOE in consideration of entry of a judgment with a covenant not to execute. The trial court in the construction defect lawsuit conducted a reasonableness hearing and determined the settlement was reasonable in the amount of three million dollars. Judgment was then entered against T & G.

Concurrent with resolution of the construction defect lawsuit, MOE filed an insurance declaratory judgment action that is the basis of this petition and named both T & G and the Association as defendants. CP 1-4. The Association filed a counterclaim for bad faith. CP 701-13. The parties litigated coverage issues, and following several summary judgment rulings, judgment was entered against MOE in favor of the Association.

MOE appealed the judgment entered against T & G in the construction defect lawsuit. MOE also appealed the summary judgment rulings and the judgment entered in this insurance action. The court of appeals formally linked the two appeals. In rulings published the same day, the court of appeals affirmed the judgment entered against T & G in the construction defect case, and vacated the judgment entered against MOE in this insurance case. MOE filed a Petition for Review in the construction defect case and the Association, in its own right and as

successor in interest to certain rights of T & G, filed a Petition for Review in this case.

In its Petition for Review in the linked appeal, MOE argued that the trial court *in the construction defect lawsuit* lacked subject matter jurisdiction to enter judgment *against T & G* because the defendant was a dissolved corporation.¹ This Court denied MOE's Petition for Review of the construction defect case.

Having lost its subject matter jurisdiction argument in the construction defect appeal, MOE has resurrected a similar argument in an attempt to dismiss this petition.

IV. ARGUMENT

A. Summary of Argument

MOE's motion is defective for multiple reasons. First, while the motion constitutes only a single paragraph, it purportedly incorporates portions of MOE's Supplemental Brief addressing Petitioners' first Issue Presented on Review. Therefore, MOE's arguments should be decided on the merits following oral argument rather than in a motion to dismiss.

¹ In its Petition for Review in the construction defect appeal, MOE relied upon RCW 23B.14.340 and *Ballard Sq. Condo. Owners Ass'n v. Dynasty Constr. Co.*, 126 Wn. App. 285, 108 P.3d 818 (2005), *aff'd on other grounds*, 158 Wn.2d 603, 146 P.3d 914 (2006), to support its dissolution argument; the same argument the insurer uses in its Supplemental Brief in this petition.

Second, the motion is based exclusively on issues of jurisdiction—which the Association vehemently challenge—involving the separate construction defect case that do not affect the jurisdiction of *this* Court to decide *this* case. The appeal in the construction defect lawsuit has been terminated; the judgment against T & G is final and unassailable. Consequently, each of MOE’s arguments related to jurisdiction of the trial court in the construction defect lawsuit are either moot, irrelevant, or both. Third, the authority MOE cites in support of its argument that this Court lacks jurisdiction is inapposite, and thus, the argument is wholly without legal authority. Lastly, MOE waived the *in personam* jurisdiction argument when the insurer failed to allege the defense in its Answer to Petition for Review.

B. The Motion is not Properly Before This Court.

Mutual of Enumclaw’s putative Motion to Dismiss consists of a single paragraph contained within its Supplemental Brief. *See* Supplemental Brief of Respondent, Mutual of Enumclaw and Motion to Dismiss (“MOE’s Motion”) at p. 20. Mutual of Enumclaw commences its argument with the statement, “As outlined above, the court in the Construction case did not have jurisdiction to render a judgment against T & G.” *Id.* Mutual of Enumclaw then continues in the next four sentences to allege that *the trial court in the separate construction defect*

lawsuit lacked jurisdiction. It is not until the fifth and final sentence of the motion that MOE claims *this* Court lacks “jurisdiction.” The motion incorporates portions of the Supplemental Brief that discuss jurisdictional issues, but these arguments relate to Petitioners’ first Issue Presented on Review. Since these issues go to the heart of this petition, they should be decided on the merits following oral argument rather than in a motion to dismiss. Accordingly, the motion is not properly before this Court and should be denied.

C. Issues of the Trial Court’s Jurisdiction in the Construction Defect Lawsuit do not Affect the Jurisdiction of This Court to Decide This Case.

After arguing extensively that the trial court in the construction defect lawsuit lacked jurisdiction, MOE nakedly contends that “this Court lacks jurisdiction to continue.” Mutual of Enumclaw’s only basis for alleging that *this* Court lacks jurisdiction is that the Association was assigned the rights to bring the action against MOE by a dissolved entity. Mutual of Enumclaw’s argument depends entirely upon the premise that the trial court in the construction defect case lacked jurisdiction, and consequently, the judgment entered against T & G is voidable. Mutual of Enumclaw’s contention is wrong. The court of appeals affirmed the judgment in the construction defect case. The appeal has been terminated. The judgment against T & G is final and not voidable.

Not only does MOE's jurisdictional argument lack merit, but it would be relevant only to the appeal of the construction defect case and not to this petition. MOE lost its appeal in the construction defect case and cannot void the judgment entered against T & G. Instead, the insurer is attempting to collaterally attack that judgment in this petition. In support of its arguments, MOE has merely recycled its briefing from its unsuccessful Petition for Review in the construction defect lawsuit. Such action is demonstrably wrong. MOE should not, and cannot, successfully argue that a judgment entered in a separate matter should be vacated due to jurisdiction claims, when the judgment was affirmed by the court of appeals and the appeal was terminated by this Court's denial of the ensuing petition for review. Because an unassailable judgment cannot be collaterally attacked, this Court should deny MOE's putative Motion to Dismiss.

D. This Court Possesses *In Personam* Jurisdiction to Decide this Petition.

Assuming *arguendo* that the trial court in the construction defect case lacked jurisdiction, MOE fails to demonstrate how lack of a trial court's jurisdiction in a separate lawsuit (judgment entered against T & G) would strip this Court of jurisdiction for determining the validity of a judgment entered against a separate entity in a separate lawsuit (judgment

entered against MOE).² MOE is attempting to turn this case into a review of the construction defect trial court's summary judgment ruling on T & G's corporate dissolution affirmative defense by raising the issues under the guise of an argument on "jurisdiction."

MOE's repeated reliance upon *Ballard Square Condominium Owners Assoc. v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006), is misplaced. *Ballard Square* is a case involving corporate dissolution that does not even contain the words "subject matter jurisdiction" or "*in personam* jurisdiction." Finally, MOE cites no authority for its proposition that "rights that were 'assigned' to [the Association] by an entity which did not exist at the time of the assignment" removes jurisdiction from this Court. MOE's Motion at p. 20.

Finally, the case MOE cites to support its general contention that this Court lacks "jurisdiction," *Picardo v. Peck*, 95 Wash. 474, 164 P. 65 (1917), does not support this argument.

² The foreign authority upon which MOE relies upon is unpersuasive, as the cited opinions involve cases where the courts found lack of jurisdiction due to dissolution in the primary cases. None of the cited opinions voided a judgment from a separate, underlying lawsuit. Moreover, it is ironic that another of the cases MOE cites, *Villas at Harbour Pointe Owners Assoc. v. Mutual of Enumclaw*, 137 Wn. App. 751, 154 P.3d 950 (2007), *rev. denied*, 180 P.3d 1292 (2008), is the construction defect lawsuit here, wherein the court of appeals rejected MOE's dissolution argument and entered judgment against T & G.

Mutual of Enumclaw does correctly cite *Picardo* for the proposition that, “A void judgment may be attacked collaterally as well as directly.” *Picardo v. Peck*, 95 Wash. 474, 475, 164 P. 65 (1917). But *Picardo* is a one-paragraph opinion from 1917 that discusses “jurisdiction” generally and fails to differentiate between “subject matter” and “*in personam*” jurisdiction. *Picardo*’s discussion of jurisdiction is inconsistent with the modern refrains of subject matter or personal jurisdiction.³

In *Picardo*, this Court found that the foreclosure judgment upon which appellant’s claim was based was void and affirmed judgment for the respondent. The reason the court found the underlying judgment void was because of evidentiary rulings from an underlying companion case, *Wagner v. Alderson*, 91 Wash. 157, 157 P. 476 (1916). The *Wagner* Court also found the foreclosure proceedings voidable. The two cases share the same set of underlying facts and some of the same parties, although they involve different claims.

In *Wagner*, this Court affirmed judgment denying the foreclosure due to evidence of the death of the mortgagor prior to commencement of

³ The opinion is so fact-specific as to make its relevance almost non-existent. Moreover, according to a Westlaw search, the opinion has been cited only two times in the 91 years since its publication.

the foreclosure. In other words, the appellant had no standing to commence the foreclosure action and thus, any judgment was voidable. The *Picardo* Court followed the same findings and similarly ruled the underlying foreclosure judgment voidable. Put concisely, in *Picardo*, there was a voidable judgment. Here, however, the underlying judgment entered against T & G in the construction defect lawsuit was affirmed by the court of appeals and is neither void nor voidable.⁴

Because *Picardo* is the only authority that MOE relies upon to support its contention that this Court lacks jurisdiction, and since *Picardo* is inapposite to the facts of this petition, MOE's motion fails and should be denied.

E. MOE Waived Any Argument Involving *In Personam* Defense.

In its Motion, MOE argues for the very first time that this Court lacks *in personam* jurisdiction to hear this petition. But MOE waived this argument when it failed to assert the defense in its Answer to the Association's Petition for Review. "In contrast to subject matter jurisdiction, personal jurisdiction cannot be raised for the first time on appeal by a party who has made a general appearance or entered a

⁴ The appeal was terminated when this Court denied MOE's Petition for Review in the construction defect case. See *Villas at Harbour Pointe Owners Assoc. v. Mutual of Enumclaw*, 137 Wn. App. 751, 154 P.3d 950 (2007), *rev denied*, 180 P.3d 1292 (2008).

responsive pleading which did not dispute personal jurisdiction.” *Robb v. Kaufman*, 81 Wn. App. 182, 188, 913 P.2d 828 (1996) (citing *In re Parks*, 48 Wn. App. 166, 170, 737 P.2d 1316, *review denied*, 109 Wn.2d 1006 (1987)). Under Washington case authority, MOE’s contention that this Court lacks *in personam* jurisdiction should be rejected.

F. Assuming *Arguendo* the Jurisdiction Argument Was Properly Before this Court, MOE’s Argument Fails.

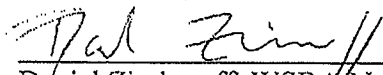
This Court need not read any further in order to deny MOE’s putative motion. However, to the extent that the Court interprets MOE’s motion to incorporate all jurisdictional issues, the Association respectfully refers this Court to its Supplemental Brief, Section III.A., at pp. 2-4.

V. CONCLUSION

MOE’s motion is not properly before this Court. The motion contains legal arguments that address Petitioners’ first Issue Presented on Review and should be decided on the merits following oral argument rather than in a motion to dismiss. Assuming *arguendo* that the motion was properly before this court, the motion fails because there is no legal authority that supports the relief requested. Lastly, by failing to raise the *in personam* jurisdiction argument in its Answer to Petition for Review, MOE waived the argument. This Court should therefore deny Respondent’s putative Motion to Dismiss.

Respectfully submitted this 12th day of May, 2008.

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